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Some recent developments

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Liability and Remedies for Breach of the Contract of Employment at Common Law: Some Recent Developments

1. Introduction

Shorn of the veneer of clear signposting, the exact line demarcating the boundary between the liability and remedial dimensions of a judicially-resolved dispute can become blurred to such an extent that where the former ends and the latter begins is extremely difficult to pinpoint. In many cases, the location of this separation point is irrelevant since the partitioning out of these two closely interdependent elements is entirely inconsequential. But in others, their unravelling is crucial in order to establish doctrinal clarity, and none more so in the case of the law of wrongful dismissal. Here, decisions of the House of Lords such as *Johnson v Unisys Ltd*,¹ and *Eastwood v Magnox Electric plc*² and the Supreme Court in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust*³ have brought issues of this kind to the forefront. Each rooted in the law of wrongful dismissal, it would be misconceived to characterise these decisions as having simply established a rule of law that denies employer liability for breaches of the implied and express terms of the contract of employment in the context of an employee's dismissal. It is argued in this note that the broader significance of these and subsequent decisions lies in what they reveal about the mounting incoherence of the common law of the contract of employment as regards wrongful termination and its consequences, as well as its capacity to generate feedback loops⁴ between these liability and remedial dimensions.

It should be stressed at the outset that this note leaves the more structural and systemic flaws associated with the decisions in *Johnson*, *Eastwood* and *Edwards* to one side: these deficiencies have been well-versed elsewhere.⁵ Instead, drawing a distinction between a breach of primary contractual obligations – i.e. the question of liability – and a breach of secondary obligations⁶ – i.e. the nature of the remedy – this note limits itself to probing three issues in greater detail. It seeks to do so within the

¹ [2003] 1 AC 518.

² [2005] 1 AC 503.

³ [2012] 2 AC 22.

⁴ M Freedland, *The Personal Employment Contract* (OUP 2003) 339.

⁵ The following is just a fraction of the published literature: L. Barmes, 'The Continuing Conceptual Crisis in the Common Law of the Contract of Employment' (2004) *Modern Law Review* 435, H. Collins and M. Freedland, 'Claim for Unfair Dismissal' (2001) 30 *Industrial Law Journal* 305, B. Hepple and G. Morris, 'The Employment Act 2002; and the Crisis of Individual Employment Rights' (2002) 31 *Industrial Law Journal* 245, 253–255, M. Freedland, *The Personal Employment Contract* (Oxford, OUP, 2003) 342–343, H. Collins, 'Compensation for Dismissal: In Search of Principle' (2012) 41 *Industrial Law Journal* 208, K. Costello, '*Edwards v Chesterfield Royal Hospital* – Parliamentary Intention and Damages Caused by Maladministration of a Contractual Dismissal Procedure' (2013) 6 *Modern Law Review* 134, C. Barnard and L. Merrett, 'Winners and Losers: *Edwards* and the Unfair Law of Dismissal' (2013) 72 *Cambridge Law Journal* 313, L Barmes, 'Judicial Influence and *Edwards v Chesterfield Royal Hospital NHS Foundation Trust & Botham v Ministry of Defence*' (2013) 42 *Industrial Law Journal* 192, A Bogg, 'Express Disciplinary Procedures in the Contract of Employment: Parliamentary Intention and the Supreme Court' (2015) 131 *Law Quarterly Review* 15, and A. Bogg and H. Collins, 'Lord Hoffmann and the Law of Employment: The Notorious Episode of *Johnson v Unisys Ltd.*' in P. S. Davies and J. Pila (eds), *The Jurisprudence of Lord Hoffmann* (Oxford, OUP, 2014) 185.

⁶ See *Photo Production Ltd. v Securicor Transport Ltd.* [1980] AC 827, 845 per Lord Wilberforce.

crucible of the post-*Edwards* case law by evaluating whether such decisions betray any signs of clarifying the liability and remedial complications generated by *Johnson*, *Eastwood* and *Edwards*. First, in the case of the 'liability' dimension, the extent to which judicial guidance has emerged to identify the causes of action that are to be treated as independent of an employee's dismissal and those which are so connected as to fall within the '*Johnson* common law exclusion zone'⁷ will be explored. This is of major importance for practical, as well as theoretical reasons, since proceedings relating to the former kind of claim are rooted in the common law and must be raised in the ordinary courts,⁸ whereas the latter must be pursued as a statutory unfair dismissal complaint through the employment tribunal system. Secondly, turning to the remedial level, the opportunity will be taken to assess the evidence for any greater readiness on the part of the courts to grant injunctive relief in respect of an employer's either defective adherence or threatened non-adherence to the terms of a contractually incorporated disciplinary procedure. The discussion on remedies will then turn to an enquiry as to whether there are any signs of the evolution of doctrine to distinguish between express terms whose breach sounds in damages and those which do not.

2. *Johnson and Edwards in a Nutshell*

In *Johnson*, the House of Lords ruled that the employer's express or implied power to dismiss an employee is in no way constrained by the implied term of mutual trust and confidence or the employer's implied contractual duty to exercise reasonable care.⁹ It was held that this premise also applied to the duty of care in negligence in the law of tort.¹⁰ Although partly justified by the doctrinal precedent of *Addis v The Gramophone Company*¹¹ – which is a case about remedies, namely the measure of damages in the context of a wrongful dismissal claim¹² – *Johnson* is primarily a case about liability, i.e. whether an employee can pursue a cause of action at common law for a purported breach either of contract or of a tortious duty of care related to his/her dismissal. Building on *Johnson*, *Eastwood* established that any breach of the implied term of mutual trust and confidence *preceding*,

⁷ See *Eastwood v Magnox Electric plc* [2005] 1 AC 503 for this distinction, depicted beautifully in the diagram in C. Barnard and L. Merrett, 'Winners and Losers: *Edwards* and the Unfair Law of Dismissal' (2013) 72 *Cambridge Law Journal* 313, 323.

⁸ Of course, this is subject to the exception whereby breach of contract claims in respect of arrears of wages or damages for wrongful dismissal up to the value of £25,000 can be brought before the employment tribunals: Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (SI 1994/1623) and Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 (SI 1994/1624).

⁹ In arriving at this conclusion, the Law Lords essentially ruled that an express notice clause in an employment contract will be effective to exclude the employer's liability for a breach of the implied term of mutual trust and confidence, or a breach of the employer's duty to exercise reasonable care in negligence in contract or tort. However, this would appear to conflict with the policy prescription articulated by section 2 of the Unfair Contract Terms Act 1977 (UCTA) which provides that a contractual term cannot have this effect in so far as this entails the exclusion of the duty not to cause personal injury or death to an employee. Furthermore, although clothing the express notice clause with this effect might have been warranted in terms of the Parliamentary intention as expressed in the unfair dismissal legislation, the fact that Parliament had made the contrary intention clear in section 2 UCTA seems to have been overlooked by the House of Lords. I am grateful to Professor Lizzie Barmes for suggesting these points.

¹⁰ [2003] 1 AC 518, 544H and 550E per Lords Hoffmann and Millett.

¹¹ [1909] AC 488.

¹² In other words, *Addis* is not a case about liability: see *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58; [2012] 2 AC 22, 52C per Lord Phillips and A. Burrows, *Remedies for Tort and Breach of Contract* 3rdedn (Oxford: OUP, 2004) 317.

and *independent* of, an employee's actual or constructive dismissal would give rise to a distinct cause of action sounding in damages in the ordinary courts.¹³ In this way, the implied term of mutual trust operates to restrain the conduct of the employer during the 'dying stages'¹⁴ of the employment relationship, i.e. events leading up to the dismissal such as the manner of a suspension, the conduct of the employer's investigation into allegations made against the employee, and the conduct of the disciplinary hearing. As for losses closely connected to the dismissal they would be disallowed at common law and fall within the '*Johnson* exclusion zone': recovery of any such losses would be governed by the statutory unfair dismissal regime and be recoverable in the employment tribunal, subject to the prescribed eligibility criteria, limitation period and the statutory rules and cap on compensation. As for *Edwards*, this concerned the appropriate response of the common law where an employer fails to follow the terms of a disciplinary procedure that has been incorporated into an employee's contract of employment. On its face, the majority of the Supreme Court in *Edwards* simply applied the same line of reasoning in *Johnson* to an express term of the contract of employment by ruling that an express contractual term (derived from a disciplinary procedure) could not serve to cut down or limit the employer's implied or express power of dismissal. However, that would be a fundamental misreading of *Edwards*, since although partially couched in the language of causes of action and liability, in fact, it is more accurately cast as a case about remedies whereby damages were denied as a suitable remedy for the breach of such an express term: there is an implicit assumption underlying the majority judgments in *Edwards* that the common law has the capacity to confer a cause of action to establish liability in such a set of factual circumstances despite the absence of a particular remedy, i.e. damages.¹⁵ It is to the consequences of *Johnson* and *Eastwood* for the imposition of employer liability at common law for breach of contract in connection with the termination of the contract of employment, as interpreted by the subsequent case law, that we first turn in the following section.

3. Liability Dimension

As articulated above, in *Eastwood*, a distinction was drawn between breaches of contract associated with the pre-dismissal elements of a disciplinary procedure giving rise to losses categorised as independent of the employee's subsequent dismissal, and losses flowing from the dismissal itself. The latter type of claim is excluded at common law, but the former is not. An obvious question is whether it is possible to detect the emergence of jurisprudence that distinguishes between these separate fact patterns, bearing in mind Lord Nicholls' recognition of the artificiality of 'chopping [such elements of a pre-dismissal disciplinary procedure]... into separate pieces.'¹⁶ In *Edwards*, Lord Kerr helpfully distilled the following principles to be drawn from *Eastwood*:

- (i) If a cause of action is in existence before dismissal, it is not extinguished by subsequent dismissal... that statement holds true even if the dismissal is consequent on the state of affairs that gave rise to the cause of action.
- (ii) If financial loss occurs (as it normally will in a dismissal

¹³ [2005] 1 AC 503, 528C per Lord Nicholls.

¹⁴ Catherine Barnard, 'Cherries: One Bite or Two?' (2006) *Cambridge Law Journal* 27, 29.

¹⁵ As such, unlike the position espoused by Shaw LJ in *Gunton v Richmond Upon Thames* [1981] Ch 448, 459F-H, the absence of a remedy could not justify the rejection of the right: K. Ewing, 'Remedies for Breach of the Contract of Employment' (1993) 52 *Cambridge Law Journal* 405, 411.

¹⁶ [2005] 1 AC 503, 528G per Lord Nicholls.

situation) [solely] from the dismissal itself, such loss is not recoverable other than by a claim for unfair dismissal... (iii) Where financial loss flows directly from an employer's failure to act fairly (or by his failure to abide by the terms of the contract of employment), even though that failure relates to steps taken which lead to dismissal, it is recoverable at the suit of the employee other than by an unfair dismissal claim.¹⁷

The recent decisions of the High Court in *Stevens v University of Birmingham*¹⁸ and the Court of Appeal in *Yapp v FCO*¹⁹ underscore the point that a breach of contract claim in connection with the disciplinary process may evade neat categorisation into (i)-(iii) in the extract above. In *Stevens*, it was held that strict literal adherence to the express terms of the employer's contractual disciplinary procedure amounted to a breach of the implied term of mutual trust and confidence. Although the employee's remedy was limited to the making of a court declaration to that effect, there is a strong argument that the losses of the employee attributable to the conduct of that procedure could be recovered as a damages remedy, since there was no subsequent dismissal. This point is thrown into sharper relief by *Yapp*, where the employee's cause of action for breach of contract was wholly severable from any subsequent dismissal, since the employee was temporarily withdrawn from his post, i.e. suspended, and there was no follow-on dismissal. As such, the claim fell outside the *Johnson* exclusion zone. Although the personal injury element in the employee's claim for damages was ultimately unsuccessful in *Yapp* on remoteness of damages and reasonable foreseeability grounds, the Court of Appeal accepted the employee's argument that the employer should be held liable for suspending the employee in breach of the implied term of mutual trust and confidence.²⁰ Seen from this perspective, both *Stevens* and *Yapp* do serve as a reminder of the fact that in order to determine whether a common law claim is excluded, the first line of enquiry in discipline-related cases should be whether there has been a dismissal: in other words, in the absence of an actual or constructive dismissal, there can be no exclusion of proceedings for breach of contract at common law.

Categories (i) and (iii) in the extract above from *Eastwood* yield the insight that simply because the matters giving rise to a claim for breach of contract or in tort are followed by a dismissal, does not necessarily preclude a finding that they remain unconnected to any subsequent termination of the employment contract. In such a case, the contractual or tortious claim will remain undisturbed by the *Johnson* exclusion zone. One recent example is the decision of the Court of Appeal in *Monk v Cann Hall*.²¹ Here, it was stated obiter that an employee's psychiatric injury allegedly attributable to the manner in which she was marched off the work premises could be severed from the employee's subsequent dismissal where that took place approximately six to seven weeks later. As such, the cause of action related to the breach of contract was treated as being independent of the subsequent dismissal. More beguilingly, Lord Justice Underhill suggested obiter that if an employee has suffered a psychiatric injury attributable to the negligent conduct of the employer and that loss has been sustained at the actual point of the employee's dismissal, the loss nonetheless ought to be treated as giving rise to an actionable cause at common law that is independent of the dismissal. In this way, the

¹⁷ [2012] 2 AC 22, 70A-C. Writer's annotations appear in square brackets throughout this note.

¹⁸ [2015] EWHC 2300 (QB).

¹⁹ [2015] IRLR 112. See D. Brodie, 'Risk Allocation and Psychiatric Harm: *Yapp v Foreign and Commonwealth Office*' (2015) 44 *Industrial Law Journal* 270.

²⁰ [2015] IRLR 112, 120 per Underhill LJ. For another successful breach of contract claim in the context of a suspension, see *Gogay v Hertfordshire County Council* [2000] IRLR 703.

²¹ [2013] IRLR 732.

claim for psychiatric loss would remain unaffected by the *Johnson* exclusion zone.²² This reasoning is grounded in the assertion that ‘despite the factual overlap [the employee] would not be bringing a claim that she had been dismissed unfairly.’²³ One interpretation of Lord Justice Underhill’s approach is that he intended to convey the idea that the juridical basis and nature of the breach of contract or tortious claim in such a context would be entirely different from any claim for wrongful dismissal.

This is in the sense that the liability in causing the employee’s psychiatric injury is derived from the employer’s unreasonable conduct that generates a reasonably foreseeable loss, as opposed to its objectionable conduct in dismissing the employee in breach of contract. The employer’s liability in this case is presumably grounded in its breach of the duty of care in tort or a breach of the implied contractual term enjoining it to exercise reasonable care in respect of the employee’s health. However, this line of argument strikes the writer as misconceived, since it is unclear how the employee’s losses that flow from the psychiatric injury could be readily or logically severed from those attributable to the dismissal itself, both losses having been sustained at the exact point of the dismissal and likely related to the manner of that dismissal. Of course, it is possible that the concept of ‘independence’ of losses in this context transcends a mere absence of contemporaneity with dismissal. For instance, ‘independence’ may encompass circumstances where one can claim with some conviction that the dismissal and psychiatric damage are entirely unconnected notwithstanding their having occurred or having been triggered, simultaneously. In such a case, the dismissal will constitute a distinct event that is separate from the occasioning of the psychiatric harm, rather than forming part of a broader process bound up with the injury itself. But it is suggested here that such a scenario is somewhat far-fetched, and would depend on a court adopting a series of evidential gymnastics that may open the law to the charge that it is scarcely credible and lacks legitimacy.

The following remark by Lord Justice Moore-Bick in *Monk* is also particularly noteworthy:

Only claims which are independent of the dismissal can properly be said to fall outside the [*Johnson*] exclusion area. Whether a claim for physical injury caused negligently in the course of escorting Mrs Monk from the premises would be regarded as independent of the dismissal for these purposes is a nice question. [Counsel for the employer] was inclined to accept that it would, but it is unnecessary to express any concluded opinion on the point.²⁴

The statement above betrays the lack of clarity surrounding whether a physical injury that is sustained at dismissal would be independent of the dismissal and as such, fall outside the *Johnson* exclusion zone. The implications of the concession made by counsel for the employer are quite remarkable, since it would appear to (i) conflict with *Johnson*, on the same basis of the discussion above in the context of losses attributable to psychiatric injury sustained at dismissal and (ii) arguably, craft a distinction between personal injuries that are (a) physical and (b) psychiatric in nature, with the losses related to the former recoverable even though they are bound up with the dismissal itself, whereas the latter precluded by *Johnson*. The application of doctrinal principle would suggest that such an outcome is unjustifiable on three grounds. First, if it is impermissible for an employee to bring a claim for breach of contract or breach of the duty of care in tort in respect of losses suffered as a result of a

²² [2013] IRLR 732, 737.

²³ [2013] IRLR 732, 737.

²⁴ [2013] IRLR 732, 735 per Moore-Bick LJ.

psychiatric injury sustained at dismissal, consistency suggests that it is only logical to preclude such claims in connection with any physical injury sustained at dismissal. Secondly, the 'constitutional' preclusion principle enunciated in *Johnson* gives rise to a paradox that also functions to prevent common law claims for physical losses. As noted by Collins, the perverse implication of the invocation of this principle by Lord Hoffmann in *Johnson* would appear to be that if a claim, right, remedy or head of loss 'can be met by the statutory law of unfair dismissal, the exclusion zone applies to the common law'.²⁵ However, there is a catch-22 in play, since the effect of the application of that very same principle by the majority in *Edwards* is such that where a claim or losses 'cannot be met by [or recovered under] the statutory law [of unfair dismissal] owing to one of its limitations, the [*Johnson*] exclusion zone'²⁶ will also operate to exclude it at common law. What this paradox means in practice is that since pecuniary losses flowing from both psychiatric and physical injuries connected with dismissal can be recovered under the auspices of the compensatory award in terms of the statutory unfair dismissal system,²⁷ the upshot of the reasoning in *Johnson* is that such a claim ought to be barred at common law. And since compensation for non-pecuniary losses in the context of the statutory unfair dismissal regime is not available where an employee has sustained a physical or psychiatric injury,²⁸ the irony is that *Edwards* furnishes a justification for the denial of such losses at common law. In other words, a rule of law favouring the recovery of non-pecuniary losses in respect of both psychiatric and physical damage at common law would cut across the statutory scheme for compensation for unfair dismissal, and for that reason, the preclusion principle also applies as regards physical injury. The end result is that two diametrically opposed 'oughts' – both entailing the denial of a common law claim for losses related to a physical injury sustained at dismissal – are derived from two kinds of 'is'. Finally, it is a challenge to identify any pressing legal policy considerations in play for any divergence in the treatment of both types of injury. The end result is that *Monk* demonstrates how the taxonomical contortions introduced by *Johnson* and *Eastwood* are problematic for the future coherent development of common law jurisprudence on the breach, and termination, of the contract of employment. This is particularly true when they are observed outside their natural habitat of the common law of the contract of employment and positioned at the junction of tort law and statutory employment protection. Of course, at an abstract level of policy, the rejection of a rule imposing employer liability in the circumstances painted by Underhill LJ and Moore-Bick LJ may appear remarkable in light of statutory health and safety laws, but it is submitted that this is the outcome of the application of doctrine. Until revised guidance is afforded by the courts, the extent to which the doctrinal principles ought to give way to such pressing health and safety policy factors will remain an (yet another) unresolved question in the common law regulation of the contract of employment.²⁹

4. Remedial Dimension

²⁵ H. Collins, 'Compensation for Dismissal: In Search of Principle' (2012) 41 *Industrial Law Journal* 208, 215.

²⁶ H. Collins, 'Compensation for Dismissal: In Search of Principle' (2012) 41 *Industrial Law Journal* 208, 215.

²⁷ Employment Rights Act 1996, s. 123 (ERA) and *Norton Tool Co. Ltd. v Tewson* [1973] 1 WLR 45.

²⁸ *Dunnachie v Kingston-Upon-Hull CC* [2005] 1 AC 226.

²⁹ For example, another is whether the Supreme Court's endorsement of the elective theory of termination of the employment contract in *Société Générale (London Branch) v Geys* [2012] UKSC 63; [2013] 1 AC 523 heralds the beginning of a reversal of the traditional hostility of the common law courts to an award of specific performance of the employment contract.

For the reason that *Edwards* established managerial liability for the breach of an express term regulating disciplinary matters, but limited the range of remedies available, Bogg has described such terms as having a 'remedial status [that] is surely unique in the English common law'.³⁰ A majority of the Justices of the Supreme Court in *Edwards* decided that the breach of such a provision does not confer a remedy in damages. Two of the majority of the Justices of the Supreme Court went further and proclaimed that injunctive relief would be available as a remedy in such a context.³¹ Of course, this is arguably doctrinally incoherent, as it turns orthodoxies about the law of remedies on its head, i.e. that damages will normally be an adequate remedy in a wrongful dismissal claim.³² It is additionally counter-intuitive insofar as the constitutional 'preclusion' principle applied by the majority in *Edwards* would suggest that the remedy of injunction ought to be barred at common law: there is no statutory machinery under Chapter II of Part X of the Employment Rights Act 1996 for the equivalent of an injunction to be awarded in the event of an employee's successful unfair dismissal claim, the remedies being limited to reinstatement, reengagement and compensation.³³ However, leaving aside this point, the emphasis on injunctions as a robust remedy in *Edwards* is arguably consistent with the recent softening in judicial attitudes towards the possibility of awarding injunctive relief over the past fifty years or so.³⁴ The question is whether there has been supplementary evidence post-*Edwards* of a greater readiness on the part of the courts to grant injunctive relief re disciplinary procedures that are contractual in status. Against such a more accommodating judicial outlook, one finds cases such as *Hendy v MOJ*³⁵ and *Al-Mishlab v Milton Keynes Hospital NHS Foundation Trust*³⁶ where the High Court refused the applications of the employees concerned for interim injunctions restraining the employers from conducting disciplinary hearings. However, this is eclipsed by more progressive decisions such as *McMillan v Airedale NHS Foundation Trust*³⁷ where injunctive relief was granted to restrain an employer from dismissing an employee in respect of a contractual disciplinary procedure.

The most prominent case with such an accommodating bent is the decision of the Supreme Court in *Chhabra v West London Mental Health NHS Trust*.³⁸ Here, Lord Hodge was prepared to grant a final injunction restraining the employer from adhering to a disciplinary procedure for gross misconduct in breach of the employee's employment contract. Lord Hodge made the point that if the employee had pursued the claim after the termination of her contract of employment, any damages award would

³⁰ A Bogg, 'Express Disciplinary Procedures in the Contract of Employment: Parliamentary Intention and the Supreme Court' (2015) 131 *Law Quarterly Review* 15.

³¹ [2012] 2 AC 22, 42e-g per Lord Dyson, with whom Lord Clarke agreed.

³² *De Francesco v Barnum* (1890) 45 Ch D 430, 438 (Fry LJ), *Ridge v Baldwin* [1964] AC 40, 65 per Lord Reid and *Wilson v St. Helen's Borough Council* [1999] 2 AC 52, 84A-B per Lord Slynn of Hadley.

³³ H. Collins, 'Compensation for Dismissal: In Search of Principle' (2012) 41 *Industrial Law Journal* 208, 214.

³⁴ See *Anderson v Pringle* [1998] IRLR 64 (cf. *Alexander v Standard Telephones and Cables Ltd.* [1990] IRLR 55), *Peace v City of Edinburgh Council* 1999 SLT 712, *Gryf-Lowczowski v Hinchingsbrooke Healthcare NHS Trust* [2005] EWHC 2407; [2006] ICR 425; [2006] IRLR 100, *Michael Kircher v Hillingdon Primary Care Trust* [2006] EWHC 21 (QB), [2006] Lloyd's Rep. Med. 215 (unreported), and *Mezey v South West London & St George's Mental Health NHS Trust* [2010] IRLR 512 (cf. *Lakshmi v Mid Cheshire Hospitals NHS Trust* [2008] IRLR 956). For a wide-ranging review of the authorities, see L. Barmes, "Remedying Workplace Harassment" (2002) 55 *Current Legal Problems* 347, 354-364.

³⁵ [2014] IRLR 856.

³⁶ [2015] EWHC 3096 (QB).

³⁷ [2014] EWCA Civ 1031, [2015] ICR 747.

³⁸ [2013] UKSC 80; [2014] ICR 194.

have been limited or simply denied outright.³⁹ In *Chhabra*, the procedural irregularities were deemed to be sufficiently material to warrant injunctive relief. A series of principles have emerged from each of these cases that guide the courts in deciding whether injunctive relief ought to be granted in favour of the employee.⁴⁰ In particular, the court will be prepared to intervene in a disciplinary process if the employee is able to demonstrate that the proceedings are being conducted on a basis which makes their conduct a breach of contract. Of course, the procedural irregularity must constitute a breach of contract, and the breach itself must reach a certain threshold of seriousness or severity. In *Chhabra*, it was decided that it will be sufficient if the procedural errors or irregularities make the continued pursuit of the disciplinary proceedings unfair in a way which cannot be remedied with or by the proceedings themselves.

The courts have also resisted any attempt by employees to ensnare them into micro-managing disciplinary procedures. For example, in *Al-Mishlab*, the High Court held that there was no justification to restrain the employer from proceeding with a disciplinary hearing, since each of the substantive and procedural points the employee had advanced in court in order to substantiate his claim for injunctive relief could be raised at the hearing, and if his arguments were held to be without foundation by the disciplinary panel, he could appeal. A cross-cutting theme is that there is a public interest to be protected. The public interest consists of the court permitting an internal disciplinary process to proceed unhindered wherever possible. This point that judicial interference should be restricted to empower internal processes to run their course is clearly closely related to the principle against micro-management. Of more interest is the proclaimed public interest in ensuring that expert panels are not hindered by over-zealous judicial intervention, i.e. the notion that experts in the field ought to take substantive decisions concerning the competence or ability of a professional to practice his/her profession.

Taken as a whole, each of these emerging propositions of law regarding the proper role of the judiciary in the context of internal disciplinary procedures can be depicted as establishing a critical mass of evidence for the claim that *Edwards* – with all of its doctrinal incoherences as regards the law of remedies – has been responsible for the emergence of a sophisticated body of jurisprudence with a more accommodating attitude on the part of the courts to the grant of injunctive relief. It is also arguable that the more relaxed approach to injunctive relief has been partially responsible for the burgeoning in the content of the employer’s implied common law obligations, since an implied right to fair treatment has emerged and been approved in decisions of the Court of Appeal in *Yapp*,⁴¹ the Supreme Court in *Chhabra*⁴² and the High Court in *Al-Mishlab*.⁴³ This is reflective of the recognition of an implied term that imposes a mixture of substantive and procedural safeguards in favour of an employee in the context of disciplinary procedures. Sharing parallels with the implied term of mutual trust and confidence, the nascent implied right to fair treatment is slightly more limited and arguably imports public law notions of natural justice into the equation to some extent. Here, we can see the

³⁹ [2013] UKSC 80; [2014] ICR 194, at para [39].

⁴⁰ *Hendy v MOJ* [2014] IRLR 856, 863 per Mann J and *Al-Mishlab v Milton Keynes Hospital NHS Foundation Trust* [2015] EWHC 3096 (QB).

⁴¹ [2015] IRLR 112, 118 per Underhill LJ.

⁴² *Chhabra v West London Mental Health NHS Trust* [2013] UKSC 80, [2014] IRLR 227, per Lord Hodge at paragraph 37 (p.233)).

⁴³ [2015] EWHC 3096 (QB) at para [17] per Mr Justice Green.

crystallisation of a potential feedback loop between the law of remedies and the rules for the establishment liability. That is to say that the remedial law of injunctive relief has spawned a set of rules of considerable maturity that establish a novel cause of action based on the implied terms of the common law of the employment contract.

One of the reasons that Barmes described *Edwards* as coming at 'an exceptionally high cost in terms of legal confusion and incoherence'⁴⁴ is the extent to which the decision renders it essential to ascertain the express terms that fall within and outside the coverage of the restricted remedial space it establishes. Post-*Edwards*, we now know that the breach of an express term of the contract of employment regulating disciplinary procedures leading to dismissal does not give rise to a common law claim for damages. One of the objectives of this piece has been to examine case law decided subsequent to *Edwards* for any traces of emerging jurisprudence that might offer clarification of key legal questions left unresolved by that case. In that vein, a pertinent question is whether any judicial thinking has emerged on how such express terms are to be identified, i.e. how does doctrine distinguish between an express term that regulates disciplinary procedures leading on to dismissal, and one that does not? On this issue, there is a real contrast with the position described earlier regarding the maturing shape of the law of injunctive relief. Instead of a fertile field, we encounter a palpable void, with no solid guidance having been proffered in any judicial decisions. As such, at this stage, the correct responses to the following questions can only be guessed at, e.g. whether the restricted remedial status applies to all express terms of the employment contract that are somehow linked to dismissal, rather than those that are simply connected to disciplinary procedures, whether damages are disallowed as a remedy where an employer prematurely terminates a fixed-term contract or where there has been a managerial breach of a 'just cause' or express notice clause?⁴⁵ A positive answer to the final question here gives rise to the potentially far-reaching proposition that the scope of operation of *Edwards* transcends the law of remedies to negate liability for breach of any express term associated with dismissal.

5. Conclusion

The jurisprudence emerging from decisions such as *Monk*, *Hendy*, *Al-Mishlab*, *McMillan* and *Chhabra* reveals the leisurely evolution of a set of legal propositions that are clearly located at different stages in their respective stages of development and sophistication. Some areas are more fully settled than others. For example, the distinct lack of any coherent set of norms in relation to the remedial standing of express contractual terms operable during the disciplinary process and dismissal can be contrasted with the more advanced state of the rules relating to injunctive relief. And both stand in contrast to the potential confusion created by the obiter judicial remarks in *Monk* concerning the independence of losses attributable to psychiatric and physical injuries inflicted at dismissal. Indeed, when this emergent body of jurisprudence is placed against the backdrop of *Addis*, *Johnson*, *Eastwood*, and *Edwards* what we are witnessing is the establishment of a symbiotic relationship between the rules for the establishment of liability for breach of contract or breach of the duty of care in tort law on the

⁴⁴ L Barmes, 'Judicial Influence and *Edwards v Chesterfield Royal Hospital NHS Foundation Trust & Botham v Ministry of Defence*' (2013) 42 *Industrial Law Journal* 192, 197.

⁴⁵ For example, see Lord Keith of Avonholm in *McClelland v Northern Ireland General Health Services Board*, who opined that damages would be available in such a case: [1957] 1 WLR 594, 609.

one hand, and the law of remedies consequent on such liability, on the other. This level of interdependence between the liability and remedial dimensions of the law regulating the termination of the contract of employment betrays the existence of a feedback loop. That is to say that decisions about remedies can lead to the emergence of doctrinal principles that have unanticipated consequences for future decisions on liability, which decisions about liability may then have knock-on implications for subsequent cases concerned with remedies, ultimately generating judicial choices which are taken for ‘brute policy’⁴⁶ reasons. The evidence for the feedback loop between the remedial and liability dimensions finds its expression in the manner in which *Addis* – a case about the remedies for a wrongful dismissal – was partially deployed by the House of Lords in *Johnson and Eastwood* as a justification for its decisions rejecting the existence of liability for breach of the employment contract or breach of the duty of care in tort. The second loop between the liability aspects of breach and the law of remedies is symbolized by the way in which *Johnson and Eastwood* both spawned *Edwards*, which singularly concerns the availability of damages as a remedy for breach of an express term in a contractually incorporated disciplinary procedure. Thereafter *Edwards*, which has generated a considerable flurry of judicial activity concerning the remedy of injunctive relief could well be interpreted as having established a new head of liability in the guise of a breach of the newly implied term enjoining an employer to treat an employee fairly whilst adhering to a disciplinary process. In doing so, *Edwards* mirrors the role played by *Addis* in being partly responsible for the spawning of *Johnson*, and *Edwards* itself as the progeny of *Johnson and Eastwood*. Although the haphazard and somewhat *ad hoc* nature of the casuistic law-making in *Addis*, *Johnson*, *Eastwood*, and *Edwards* might well be interpreted as having created a disoriented and fragmented set of legal propositions with some justification, it is somewhat ironic that they have been responsible for the materialisation of an implied common law norm to fair treatment that is undoubtedly more attuned to general contractual principles which seek to confer expectation damages,⁴⁷ whilst going ‘beyond exchange’⁴⁸ to reflect the relational nature⁴⁹ of the contract of employment.⁵⁰ If the law regulating breach and termination of the contract of employment is ever going to keep up with the frenetic pace of change in underlying economic and social conditions, such a normative recalibration of this nature, which marries policy and doctrinal principle ought to be welcomed, provided that it is carefully reoriented within a framework that is internally coherent. That is the challenge that faces labour lawyers going forward.

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⁴⁶H. Collins, ‘Compensation for Dismissal: In Search of Principle’ (2012) 41 *Industrial Law Journal* 208, 226.

⁴⁷ H. Collins, ‘Compensation for Dismissal: In Search of Principle’ (2012) 41 *Industrial Law Journal* 208.

⁴⁸ D. Brodie, “Beyond Exchange: the New Contract of Employment” (1998) 27 *Industrial Law Journal* 79; D. Brodie, “Legal Coherence and the Employment Revolution” (2001) 117 *Law Quarterly Review* 604.

⁴⁹*Johnson v Unisys Ltd* [2003] 1 A.C. 518, 532F per Lord Steyn.

⁵⁰ D. Brodie, “How Relational is the Employment Contract?” (2011) 40 *Industrial Law Journal* 232.